



OFFICE OF THE VICE PRESIDENT

WASHINGTON

May 1, 2008

Mr. Perry Apelbaum
Chief of Staff and Counsel
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Apelbaum:

This letter follows up on the letter from the Committee on the Judiciary of the House of Representatives ("Committee") to the Chief of Staff to the Vice President ("Chief of Staff") of April 11, 2008, my letter to the Committee of April 18, 2008, and the Committee's letter to the Chief of Staff of April 28, 2008. The legal views of the Office of the Vice President regarding your request for the Chief of Staff's attendance at the investigative hearing you propose for May 6, 2008 remain as stated in my letter of April 18 and this letter.

The Office of the Vice President remains of the view that the courts, to protect the institution of the Vice Presidency under the Constitution from encroachment by committees of Congress, would recognize that a chief of staff or counsel to the Vice President is immune from compulsion to appear before committees of Congress to testify concerning official duties performed for the Vice President.

In deciding whether to invoke that immunity in this particular case, the Office of the Vice President has taken account of the Committee letter of April 28, 2008, which confirmed that the Committee proposal to ask questions of the Chief of Staff is substantially narrower in scope than first appeared from the Committee's letter of April 11, 2008. The Committee letter of April 28, 2008 made clear, with respect to the proposed questioning, that:

- first, the Committee recognizes that the Chief of Staff is not in a position to provide authoritative representation of the President on issues regarding "the nature and scope of Presidential power in time of war," "the Administration's approach to these questions under U.S. and international law," or "United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces" (Page Two of Committee Letter of April 28, 2008; quotations from Page One of Committee Letter of April 11, 2008);
- second, the Committee questions to the Chief of Staff would seek only "personal knowledge of key historical facts" relating to the three subjects quoted above (Page Two of Committee Letter of April 28, 2008);
- third, the Committee does not seek information relating to Vice Presidential communications or to Vice Presidential recommendations to the President (Page Three of Committee Letter of April 28, 2008);

- fourth, the Committee does not seek information relating to the Senate functions of the Vice Presidency (Footnote 11 of Committee Letter of April 28, 2008); and
- fifth, applicable legal privileges may be invoked in response to questions (Page Four of Committee Letter of April 28, 2008).

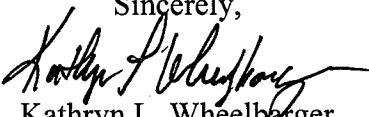
The Committee letter of April 28 refers vaguely to asking questions in response to which the Committee would expect the Chief of Staff to share "professional expertise" with the Committee. Because the Chief of Staff's profession is that of an attorney, we assume that the practice of law is the profession to which you refer. To avoid any misunderstanding or surprise, please be clear that the Committee is not the Chief of Staff's client and the Chief of Staff is not in a position to render legal advice, opinions or services to the Committee.

The Office of the Vice President notes that the Committee has not, by the general citation to "McGrain v. Daugherty, 273 U.S. 135 (1927), and its progeny," met its burden of demonstrating a satisfactory constitutional basis under the principles set forth in Barenblatt v. United States, 360 U.S. 109 (1959) for inquiry by the House of Representatives of the Office of the Vice President. Further, the Committee has not, by the general citations to "Rules X(1)(k), X(2), and XI" of the House of Representatives for the 110th Congress, met its burden of demonstrating that, if the House had a constitutional basis for such inquiry, the House has assigned jurisdiction of the matter to the Committee on the Judiciary.

For the reasons stated in my letter of April 18 and above, the Committee may wish to hold the Committee request for testimony in abeyance while it exhausts other sources for the kinds of information the Committee seeks, or the Committee may wish to forgo the request altogether. If, however, the Committee wishes to pursue its request, then -- as a matter of comity, relying on the representations in your letters of April 11 and 28, including especially the five points set forth above, and reserving all legal authorities, immunities, questions and privileges, including with respect to the lawfulness of the inquiry under the Constitution and House rules -- the Chief of Staff to the Vice President is prepared to accept timely service of a Committee subpoena for testimony for a hearing on May 6, 2008.

We hope and expect that the Committee will recognize the importance of protecting the institution of the Vice Presidency under the Constitution, so that present and future Vice Presidents can continue to serve America effectively.

Sincerely,


Kathryn L. Wheelbarger
Counsel to the Vice President

cc: Mr. Sean McLaughlin
Minority Chief Counsel
Committee on the Judiciary